Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

URSULA LAWRENCE,
Petitioner,

-against-

COLUMBIA PRESBYTERIAN MEDICAL CENTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

Whether determination of a claim of retaliation under the "participation" clause of 42 U.S.C. 2000e-3(a) without articulation by the employer of a non-discriminatory reason for delay in communicating employer's mistake to employee was clearly erroneous.

PARTIES

The caption lists all of the parties in the United States Court of Appeals for the Second Circuit and in the District Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

URSULA LAWRENCE,
Petitioner,

v.

COLUMBIA PRESBYTERIAN MEDICAL CENTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Ursula Lawrence respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on November 8, 1993. An extension of time to March 8, 1994 was granted by Mr. Justice Clarence Thomas on February 1, 1994.

JURISDICTION

This Court has jurisdiction to hear this appeal from the final decision in the District Court and in the Court of Appeals. 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether determination of a claim of retaliation under the "participation" clause of 42 U.S.C. 2000e-3(a) without articulation by the employer of a non-discriminatory reason for delay in communicating employer's mistake to employee was clearly erroneous.

STATUTE INVOLVED

Section 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C.S. Sections 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C.S. Sections 2000e-2000e-17].

OPINIONS BELOW

The unreported decision of the District Court on the issue of retaliation under 42 U.S.C. 2000e-3(a) consists of two pages and is reproduced in the Appendix. The opinion and order of the Court of Appeals is also unreported and reproduced in the Appendix.

The District Court's Findings and Conclusions, including the finding of delay, which is the basis for the charge of retaliation and the Rule 59(e) motion is also reproduced in the Appendix.

STATEMENT OF THE CASE

On November 7, 1988, Mrs. Lawrence returned from her vacation and was told that she was to be transferred to a night shift. She had previously complained about the horror she experienced on October 12, 1988: she had been assigned to an abortion room, where she was required to take part in activities that were contrary to her religious beliefs. She was not given a reason why she was assigned to that room in the first place, nor a response to her claim that she was not removed. Such removal had been promised by her supervisor. The day after the transfer, she wrote a letter of complaint of religious discrimination to the hospital administration. Reasons for her assignment and her claimed non-removal were eventually given, but not until trial.

Judge Brieant found that the reason for appellee's actions on October 12, 1988, was that they had made a mistake, and not that they had discriminated. That legal conclusion is not in question here. This appeal focuses exclusively upon the arbitrary manner in which Judge Brieant disregarded appellant's post-trial claim of retaliation, which is independent from her original charge

of discrimination. Judge Brieant did not allow it to be litigated, and his actions directly contradicted the burden of proof procedures established by settled law. See St. Mary's Honor Center v. Hicks, No. 92-602, 113 S. Ct. 2742 (1993).

The employer has still not given an explanation for waiting until trial to come forward with the reasons which Judge Brieant later found to be satisfactory. On November 7, 1988, the date of her transfer, Mrs. Lawrence knew that due to her age and health, she would be unable to work the late night shift which she was transferred to. She informed the hospital of this and actively sought an explanation for her assignment to the abortion room and for her claimed non-removal. She hoped that upon receiving the explanation, the problems could be worked out and that she could remain an employee of the hospital. She thought that they would at least give her the common courtesy of an explanation of what had occurred. It was not until three months later that she finally heard from the hospital. On February 7, 1989, they gave her the reason for her transfer as unsatisfactory performance, but still did not explain that she had been put into the abortion room by mistake. She then sought other employment, which she easily obtained but continued, until trial three years later, to suffer from the impression of arbitrary discrimination in being placed in the abortion room by her superiors.

Throughout the three-month period, the employer was aware that Mrs. Lawrence was not working or receiving her salary and that she was actively seeking an explanation, in the hope of working things out and continuing as a day-time employee. Despite her anguish and numerous letters, they waited for three months before answering her at all, and still never responded to her about her most troubling questions. Title VII imposes upon employers the duty to act in a manner which will reduce discrimination in the work place. Failure by the employer in the

case at bar to disclose its mistake to the employee violated this principle and constituted retaliation under 42 U.S.C. 2000e-3(a) for her "participation" in the EEO process.

REASONS FOR GRANTING THE WRIT

Determination of a claim of retaliation under the "participation" clause of 42 U.S.C. 2000e-3(a) without articulation by the employer of a non-discriminatory reason for delay in communicating employer's mistake to employee was clearly erroneous.

This Court has not decided a case directly under 42 U.S.C. 2000e-3(a) since McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973).

The law in regard to a burden of proof in a retaliation charge became well settled in the Second Circuit in Grant v. Bethlehem Steel Corp. 622 F.2d 43 (1980). "[T]he plaintiff must first establish a prima facie case; the burden then shifts to the employer to articulate some legitimate non-discriminatory reason for the alleged acts of reprisal; and lastly, the burden returns to the plaintiff, who is given an opportunity to demonstrate that the employer's reasons are a mere pretext for discrimination taken in retaliation for participation in protected activities." Id. at 46. In his original decision, Judge Brieant did not address the issue of the three-month delay in his conclusions of law. In the post-trial memorandum in which he briefly addressed it, he discarded it without even the slightest effort to conform his decision to this established rule of law. Respondent has never given such an

explanation for the three-month delay and was not compelled by Judge Brieant to do so, as required by law. Grant v. Bethlehem Steel Corp., supra. This denied appellant the opportunity to litigate the issue in regard to the pretextual nature of whatever explanation, if any, that the appellee can offer. If such an explanation is forthcoming, it should be litigated at the trial level. Accordingly, Petitioner asks that this court reverse the arbitrary decisions of Judge Brieant and the Court of Appeals and remand for further proceedings.

Petitioner's letter to Respondent claiming religious discrimination was "participation" in the EEO process under 42 U.S.C. 2000e-3(a). Kotcher v. Rosa and Sullivan Appliance Center, Inc., 957 F2d 59, 64-65 (CA2, 1992). See also, EEOC v. Kallir, Phillips, Ross, Inc., 401 F. Supp. 919 (1976), aff'd 559 F2d 1203 (CA2), cert den. , 434 U.S. 920 (1977), relied upon by Petitioner in the courts below. Such participation per se constituted a prima facie case with respect to adverse employment actions. See Schlei & Grossman, Employment Discrimination, Ch. 15, p. 541.

CONCLUSION

The Memorandum and Order, dated December 22, 1992, which determined the charge of retaliation under 28 U.S.C. 2000e-3(a) without requiring the employer to articulate a reason for delay in disclosing its mistake and the decision of the Court of Appeals affirming said decision should be reversed and the case remanded for further proceedings.

Dated: New York, N.Y.
March 3, 1994

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of November one thousand nine hundred and ninety-three.

Present: HONORABLE JAMES L. OAKES,

HONORABLE AMALYA L. KEARSE,

HONORABLE FRANK X. ALTIMARI,

Circuit Judges.

URSULA LAWRENCE,
Plaintiff-Appellant,

v.

COLUMBIA PRESBYTERIAN MEDICAL CENTER,
Defendant-Appellee.

No. 93-7079

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Plaintiff Ursula Lawrence appeals from a judgment of the United States District Court for the Southern District of New York entered after a bench trial before Charles L. Brieant, then-Chief Judge, dismissing her complaint against defendant Columbia Presbyterian Medical Center ("CPMC") for employment discrimination on the basis of her religious opposition to abortion, in violation of 42 U.S.C. Section 2000e et seq. ("Title VII") on the ground that Lawrence had not proved that her religious beliefs "played any part whatsoever in the decision making process of the hospital." On appeal, Lawrence contends that the court erred in denying a post-trial motion for judgment in her favor on a theory of discriminatory retaliation without requiring CPMC to advance a nondiscriminatory reason for its allegedly retaliatory action. We find no ground for reversal.

Lawrence's Title VII claim was that CPMC discriminated against her on the basis of her religious beliefs by assigning her to staff an operating room in which elective abortions were performed. After a bench trial, the district court found, inter alia, that it was CPMC's policy not to assign an employee to participate in elective abortions unless the employee was willing to do so; that this policy was well known; that the assignment of Lawrence to an operating room in which an elective abortion may have been

performed was the result of an inadvertent mistake and was not in any way caused by an intentional disregard of her religious beliefs; and that CPMC quickly rectified the mistake by relieving Lawrence of the assignment, though for unexplained reasons Lawrence did not promptly thereafter leave the operating room.

Lawrence did not challenge any of these findings but argued in a post-trial motion for judgment in her favor that CPMC's delay in advising her that its initial assignment was the result of mistake constituted discriminatory retaliation in violation of Title VII. Lawrence did not point to any evidence that the delay in informing her that the assignment had been the result of mistake was itself the result of religious discrimination; indeed, her motion stated that the delay was "[f]or reasons unknown." (Declaration of A. Lawrence Washburn, Jr., dated December 14, 1992 para. 11.) The district court was not required to attribute the delay to a discriminatory animus, and its finding that there "has been no proof of any violation of plaintiff's civil rights by the defendant" is not clearly erroneous. In the circumstances, the court properly denied Lawrence's motion without requiring a response from CPMC. Cf. Saint Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993) (defendant employer need not articulate a particular reason for its action in order to prevail after a trial if the fact-finder concludes that there was no discriminatory animus).

We have considered all of Lawrence's arguments on this appeal and have found them to be without merit.

The judgment of the district court is affirmed.

JAMES L. OAKES, U.S.C.J.

AMALYA L. KEARSE, U.S.C.J.

FRANK X. ALTIMARI, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

URSULA LAWRENCE,
Plaintiff,

v.

COLUMBIA PRESBYTERIAN MEDICAL CENTER,
Defendant.

MEMORANDUM AND ORDER
90 Civ. 5716 (CLB)

Brieant, Chief Judge.

Familiarity with all prior proceedings in this Title VII Civil Rights case, alleging religious discrimination based on plaintiff's anti-abortion beliefs, is assumed on the part of the reader. On December 1, 1992, following a two-day non-jury trial, this Court delivered its oral findings of fact and conclusions of law, and ordered entry of judgment for defendant.

The plaintiff has filed, pursuant to Fed. R. Civ. Proc. Rules 59(e), 15(b), and 54(c), a motion to amend the complaint to conform to the evidence received at trial, to grant plaintiff relief pursuant to 42 U.S.C. Section 2000e-3(a), and to amend the judgment to compensate plaintiff for lost wages, including prejudgment interest. The Notice of Motion, and supporting Memorandum and Declaration, were dated December 14, 1992,

and docketed on December 16, 1992, with the proposed return date of January 20, 1993.

Plaintiff argues that the defendant withheld crucial information which would have allowed the plaintiff to get on with her life a little earlier, and that defendant's delay in providing this information – that plaintiff was not in fact discriminated against because of her religious or moral beliefs, but rather, that she was scheduled to work in an abortion room that day by mistake – caused plaintiff great mental anguish and prevented her from seeking alternate employment for three months.

No hearing is necessary on the motion. The motion is denied in all respects, except that plaintiff is deemed to have amended her complaint to conform to the proof received at trial. There has been no proof of any violation of plaintiff's civil rights by the defendant. Accordingly, relief cannot be granted, and this Court's judgment in favor of the defendant was appropriate. There is no need for additional submissions or argument. A final judgment has been entered. Plaintiff, if so advised, is free to exercise her right to review that judgment by direct appeal.

SO ORDERED.

Dated: White Plains, New York
December 22, 1992

Charles L. Brieant
Chief Judge

AFTERNOON SESSION

(2:10 p.m.)

(In open court)

THE COURT: Did you have any productivity in the hallway?

MR. WASHBURN: I can tell you we tried, your Honor.

THE COURT: That's all we can do. I will pick up with you in just a moment.

The Court will now make its findings of fact and conclusions of law after trial. When I finish, I will ask each attorney for any additional requests that they may have.

The Court appreciates, as I said to you people informally at the sidebar, the fact that you tried the case here in an expeditious and sensitive fashion, and the Court appreciates that this is a difficult case, where understandings and recollections and perhaps motivations are at issue.

The Court finds that the federal question claim pleaded here, and the Court has subject matter jurisdiction of Title 7 of the Civil Rights Act of 1964 and perhaps also under the L. -Burton statute, and the Court has listened carefully to the testimony which was taken here. The Court finds it has jurisdiction over the parties.

Also the Court finds that the plaintiff obtained a degree as a registered nurse, and she worked in a portion of the hospital known colloquially as Babies Hospital, and she was required to work the evening shift.

In March of 1988, she applied for and was accepted for a day shift surgical nurse position in a general surgery suite as an intern or student. Such nurses worked in the surgical facilities of the hospital under the guidance of preceptors and other nurses, and they received a six-month orientation and probationary program, which consisted of classroom and clinical instruction and together also with actual work in the hospital and rotation throughout the various services.

The Court has pointed out that this is not a case arising under Section 301, and I don't think I have to repeat that. This is a Title 7 case, and the Court finds that the plaintiff was terminated as a result of a meeting held on November 7th, 1988 with Dr. Mannetti and Miss Northup. This was not actually a termination, and indeed it was not even a demotion, because the plaintiff was permitted to be reassigned at the same rate of pay to the prior work to which she had been doing before she was admitted to this program.

It may well be that the reclassification or rejection of the plaintiff as an operating room nurse was after the expiration of the probationary period. However, that does not constitute a violation of Title 7, and as I noted earlier, to the extent that there is a Section 301 case lurking in the background, that's barred by time, and the Court is not even sure that there is any such case.

The Court finds that after completion of her internship or tutorial program or however you wish to describe it, she left because she refused to return to the so-called Babies Hospital. She took appropriate procedures to mitigate her damages, and the Court finds she is a fully qualified operating room nurse and that she is presently employed in that capacity in another hospital, and for all the evidence in the case, successful.

The Court is now going to address itself to the actual evidence and to the inferences.

The Court is aware that Mr. Washburn has argued very eloquently that adverse inferences can flow against an employer when the employer withholds essential facts and evidence in a lawsuit, which was pending in this court for almost four years. It had the careful attention of the United States Magistrate Judge. On occasion, I had seen counsel. Nowhere along the line, apparently, did the defendant inform the plaintiff of the proof which was available from Miss Gatti or Miss Zuckerman, and the Court would have the power to draw an adverse inference against the defendant as to the correct or truthfulness of that evidence.

Also, the Court knows that withholding that information unduly prolonged and magnified the scope of this litigation. However, the Court on the totality of the evidence does not believe that it can draw the inference that either Miss Gatti or the supervisor of nurses testified falsely in this trial.

The situation which arose on October 12th was as follows:

There was an unavailable person to be assigned to operating room three, which was a room used, not entirely, but largely for so-called elective or voluntary abortions. It is well-known to all nurses who are educated professionals that under L. ~Burton and under the policies of this hospital, no one is required to participate in abortions, unless he or she is willing to do so. And the testimony is uncontradicted that this is the policy and that it was known to everybody.

The Court finds that Miss Zuckerman had a list of the people who were ready, willing and able to do this work, and she had it posted on the wall, and they were doing it to the exclusion of

other persons, including Dr. Mannetti and herself, because they, for philosophical, ethical and other reasons, were opposed to performing this kind of thing.

The plaintiff showed up in operating room three early in the morning, at about 8:10, perhaps a little earlier, because the patient came into the operating room at 8:10. That was the patient, Barbara Newman. The Court finds that the so-called misor work sheet, M-I-S-O-R, is a regularly kept record in this case, Exhibit C, and that shows that Miss Newman's case was presided over by Frank Miller, who testified here today, and that plaintiff, Miss Lawrence, acted as the circulating nurse in that particular procedure.

That procedure was an entirely legitimate procedure. Everyone admits that this was not an elective procedure. It involved someone who already suffered a spontaneous abortion or miscarriage or something and was there for treatment, because she was hemorrhaging and it was entirely proper that she go there and do the work.

However, the Court notes that Miss Lawrence was not yet qualified in the gynecological service, and that she was not listed on the records of the hospital as available for any kind of gynecological service without regard to whether it involved elective abortions.

The Court finds that Exhibit C is a valid record and correctly reflects the facts, and that the procedure for Miss Newman was concluded at 8:40 a.m. The incision having been made at 8:25 a.m.

The next available exhibit here is found in Exhibit D, which is the misor report for a voluntary abortion on a patient

Zachery. And this exhibit shows that Frank Miller, who testified here at trial, was the scrub nurse in that procedure, and that Miss Gatti, who also testified in trial, was the circulating nurse, and the entry contains a reference for Miss Lawrence as C2 or a second circulating nurse. There was no requirement that there be a second nurse, and the hospital traditionally staffed this work with only two nurses; one circulating and one scrub nurse.

Exhibit E shows that the patient Bassora entered at 10:20, but the incision was not made until 11:23, and she exited at 11:40. This is a procedure which caused a great uproar because the boyfriend or husband or whoever he was pounded on the door and attempted to remonstrate with the patient not to do it. The misor work sheet, which this Court finds to be a regularly kept record correctly shows that Mr. Miller was the scrub nurse, that Miss Lawrence was listed as circulating nurse, number one, and Miss Gatti as circulating nurse number two.

It is claimed by the plaintiff that there was an additional elective abortion that was performed that morning. The Court doesn't find any evidence which really supports that inference. There is no identification of the patient or the doctor or anything else which could permit of such a finding. However, the Court does not believe that that particular fact is of particular relevance.

To have a Title 7 violation, there is at least some element of intent in the statutory violation. It is not necessary, of course, that the plaintiff prove that the defendants willfully or deliberately forced her into a situation which she was privileged from performing under the statute and which violated her civil rights.

What we have here is a well-established policy testified to without contradiction by Miss Gatti, Miss Zuckerman, Dr. Mannetti and no evidence to the contrary; and the Court finds that

it was not a policy of the hospital to send her into this case for two reasons; she hadn't completed her gynecological service and also she was known as being unwilling to do this type of procedure.

The Court finds that the testimony of Miss Gatti is essentially truthful, and that her account of the policy, of the hospital policy is valid and truthful, and that Miss Zuckerman called her into the office and told her "Go relieve Ursula in operating room number three," and she went in to relieve her.

Now, Miss Lawrence denies this, and Miss Lawrence, for reasons unknown to the Court, remained in the room. And it's quite possible either that she did not hear or that she did not understand or that she was so emotionally upset that it did not register in her mind. However, the employer by that point had done all that she could do by sending Miss Gatti in and telling Miss Gatti to relieve Miss Lawrence, and the Court finds that that did in fact happen, and I am told Miss Lawrence did not leave the room.

Miss Gatti says that she did not participate in the elective abortion, and the instruction given to her by Miss Zuckerman was "Go in and relieve Ursula; she doesn't do abortions." I find that that really happened, and there was no intentional violation here.

What there was was a rather serious mistake. The mistake was two-fold. Mistake one was putting her in there for the first operation, the one which was a nonelective abortion where she wasn't qualified to do it, because she hadn't been on the rotation and leaving her there at least some period of time following the arriving of Miss Gatti on the scene. But there was no intentional coercion by the hospital to require this particular nurse to do the work.

The Court finds that many highly regarded health care professionals are philosophically or religiously opposed and that they make their oppositions felt and that the hospital attempts, to the best of its ability, to honor those positions by the employees. And the fact that this did not, was essentially the result of a mistake or a shortage of personnel, and she never should have been there, in any event, because she hadn't completed the gynecological service.

The Court then turns to the question of motivation, and the Court finds that the employer in a Title 7 case may prove nonpretextual reasons for discharging, terminating, demoting or reassigning an employee, and then the employee must give the Court some basis by which the Court can find that this is all pretextual and done to get even with her, because of her position on the rather serious issue.

Plaintiff has in my judgment failed completely to demonstrate that these reasons are pretextual. Some of the reasons are perhaps a little bit farfetched. Some of them are a little bit narrow. They contain highly subjective comments like they tried hard but had difficulties and that she was slower in learning and that she felt stress and did not accept criticism well and that she did not improve during her internship. It's alleged that she dropped a wet sponge on a sterile drape and then there is this extensive evidence about the issue of administration of a narcotic intravenously.

The Court is not required to find that a fair-minded employer would have terminated her for any or all of these items, and the employer is entitled to be stringent and perhaps it's even to be said an employer is entitled to be unaware.

The real issue is not whether or not she should have been fired but whether the reasons given for not advancing her in the program were pretextual, and the Court finds there is no evidence that they were. And the Court declines to draw that inference from the fact that the defendant held onto the evidence in its favor and never exposed to plaintiff the fact that the testimony of Miss Gatti, which the Court observed Miss Gatti's demeanor, the Court believes she was a truthful witness and that her recollection is more likely to be representative of what actually happened than any evidence to the contrary.

Perhaps, perhaps the decision makers of the case were essentially Dr. Mannetti, and she was entitled to be arbitrary or perhaps even unfair, but she did not have or exhibit pretextual reasons, and I find there is no evidence which would permit a reasonable finder of fact to infer here that she was motivated by bias against the plaintiff, because she was insisting on her civil rights to be free of doing elective abortions.

And as I said earlier, the assignment in that operating room was essentially a mistake. It was improper for two reasons; because she wasn't qualified to go in there, and she wasn't supposed to be required to do any work beyond the first patient, which was legitimate work on her part. The assignment was made because a regularly scheduled nurse called in sick and the night supervisor perceived she had no one else to cover the room. That's essentially scheduling by accident.

Although it's highly regrettable and there has been some injury due to inadequate training, conceivably it might have led to a civil lawsuit, but that didn't happen, and the Court does not find that there was any violation of her personal, moral or religious beliefs.

The Court further finds she has not proved her position that this subject played any part whatsoever in the decision making process of the hospital, and as I said earlier, the issue is not whether this Court sitting arbiter advanced her or terminated her but rather whether the reasons they gave were genuine, sincere and nonpretextual. The Court finds essentially that they are calling in that regard to whether they are necessarily the opinion, which this Court might have, if the Court tried the issue de novo, which I am not required or even permitted to do.

That constitutes my findings of fact and conclusions of law and matter, and the defense may request any additional findings at this time to amplify the record so all of you can seek the guidance of the Court of Appeals.

MR. WASHBURN: Thank you, your Honor.

MR. PLUM: Your Honor, I would just like to address myself briefly to the question of holding onto evidence or unduly prolonging the scope and totality, I think the Court said, of litigation.

With all due respect, I think that that is a finding that's not warranted for the following reasons:

Number one, the defendant's position in this case was fully laid out.

THE COURT: Did you ever at any time tell him orally or in writing that it was your contention that she got assigned in there by mistake because the night supervisor had nobody to put in there because somebody hadn't shown up?

MR. PLUM: Your Honor, I was about to get to that question.

THE COURT: You can answer that yes or no.

MR. PLUM: It was laid out in a position statement to the Equal Employment Opportunity Commission, which was available to the plaintiff and her counsel the moment the no probable cause determination was issued. Moreover, there was never a request, there were never interrogatories served by plaintiff, there was never a deposition served by plaintiff.

THE COURT: How much interrogatories are lawyers supposed to do in a $14,000 lawsuit?

MR. PLUM: There was nothing done, your Honor.

THE COURT: It seems call him up, we have got two credible witnesses here, Zuckerman and Gatti, this is what they are going to tell you, you have nothing to overcome that except this inference you want the Court to draw because the fact you played it so close to the vest. I admit, the Court could draw an inference. I think, in balance, I ought not to.

I observed these witnesses. I believed they were telling the truth. I think her perceptions are entirely different. There is no question about that.

Also on the issue of whether Miss Gatti was in the room, the Court is using her testimony and the misor exhibits.

MR. PLUM: Your Honor, I think our position was clear at the deposition. I don't want to get into an argument now with Mr. Washburn about whether it was or wasn't, but I believe our

position in this litigation has been clear in the three or four – it was made clear in the three or four sessions of the deposition. I don't believe that a finding is warranted – I'm not sure it makes much difference, but in terms of practice and how we conduct ourselves before the Court, I am not comfortable with the Court believing that we withheld onto evidence. I don't believe we have an obligation when nobody tells us, when nobody comes forward with any discovery requests, when our position is available in a public document for the EEOC. Frankly, we assumed that they knew what our position was. We did not make a specific phone call.

THE COURT: You made your adversary charge his client two days of trial when you knew you had these two witnesses?

MR. PLUM: I am absolutely confident it would have made no difference. In the hallway outside, it made no difference. After hearing the testimony, it made no difference in what was offered to us as a settlement, your Honor.

THE COURT: Do you have any other further requests to find?

MR. PLUM: No, sir.

THE COURT: Mr. Washburn, do you have any other further requests to find for the Court to complete your trial record so that you can go on to the next court?

MR. WASHBURN: The decision that's going on in the next court is a very difficult one, your Honor.

THE COURT: Everybody goes; nobody knows what panel they will get. It's my function to get as complete and possible a set of findings and conclusions.

MR. WASHBURN: Right. Your Honor, when I closed before the Court, I addressed the Tyler case and the mixed motive. You have addressed the pretext in your findings. I realize that you have probably thought through the mixed motive analysis, which is, as you know, that where there is a religious discriminatory problem in the picture and a claim of one that is on the table, as it were, in the employer context, that the Court will decide whether that was, as they say in Tyler, is the same test under Price Waterhouse.

THE COURT: I don't think I have to reach that, Mr. Washburn, because I think you have to have an intentional violation. Now, I admit it doesn't have to be willful, but it has to at least be deliberate. There is no evidence this was deliberate. This is one of those glorious big mistakes that happened in a large entity like a hospital. She never should have gone in there for two reasons, not the least of which is she wasn't qualified. She went in there either by mistake or because they had no one else to send in. The first time she went in there, it was legitimate, as far as she was concerned. The second time, I am using Miss Gatti's testimony, Miss Gatti said they came in to relieve her, she didn't leave the room. Why? She said she didn't understand it or she was too emotionally distressed over the whole thing or maybe she didn't hear, but I think the evidence here is overwhelming. Since there is no violation, there is no issue of motive.

MR. WASHBURN: So under a mixed motive analysis under Tyler comes in when there is a problem in the picture. You have, I think, recognized in your findings that there was a problem in putting her in that room. She claimed it was something she had objected to and that they had ignored and so on. What I'm asking you to do is to take the next step, which is both sides have briefed both pretext and mixed motive. You have done one, but you have not addressed the other.

THE COURT: I declined to find there is any mixed motive issue. I am willing to count stupidity as motivation. This is one of those glorious mistakes. As I said earlier, if you knew that in advance of the trial, you should have been aware.

All right, I adhere to my finding. The Court directs the clerk to enter a judgment that all relief be denied on this complaint in all its aspects, and the Court will require that each party bear its own costs.

The foregoing constitutes the Court's findings of fact and conclusions of law after trial.

Thank you all very much.

MR. WASHBURN: Your Honor, there is one matter I would like to clarify for the record on appeal, if I may. I know you have concluded there is a discussion in both briefs as to whether Section 107 of the Civil Rights Act of 1991 applies in this case.

THE COURT: The Court is assuming it applies.

MR. WASHBURN: Thank you, your Honor.

THE COURT: You have to have a factual basis for your case, and I think you thought you did and you really didn't. I think I said all I can say.

MR. PLUM: Your Honor, the issue that Mr. Washburn just raised is the retroactivity of the Civil Rights Act of 1991. I believe that almost of all the decisions in this circuit have held that it's not retroactive.

THE COURT: I don't think I even need to reach it. If there is no proof of a Title 7 violation, that's the end of discussion. Maybe they would hold it's retroactive. Maybe there are some pending state claims. I think I did the best for all of you, and you can go to the Court of Appeals.

MR. WASHBURN: May I say something? I only claimed prospective application of 107.

THE COURT: Did you talk to Judge Fox about that?

MR. PLUM: Retroactivity, this was referred to Magistrate Fox only for purposes of settlement.

THE COURT: Even then it was proper subject for discussion.

MR. WASHBURN: That's right. We could have claimed different damages under different sections. We are not claiming those sections. The Civil Rights Act went into effect a year ago, a little more than a year ago. We are not claiming retroactivity, we are claiming prospective retroactivity only to Section 107.

THE COURT: You see, this employment decision, if it was what you claim it was, was perfected prior to enactment of the statute. I don't have to reach that.

MR. WASHBURN: Exactly. They could not have relied on Price Waterhouse because the discriminatory activity took place before Price Waterhouse. What the Civil Rights Act did was change Price Waterhouse.

THE COURT: I have done the best I can, Mr. Washburn. Take it to appeal.

Court will be in recess.

MR. WASHBURN: Thank you very much.

(Trial concluded at 2:45 p.m.)